



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

APR 27 2005

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Pat Toomey for Senate Committee
Jeffrey M. Zimaskind, Treasurer
P. O. Box 8658
Allentown, PA 18105

RE: MUR 5415
Pat Toomey for Senate Committee and
Jeffrey M. Zimaskind, in his official
capacity as Treasurer

Dear Mr. Zimaskind:

On March 1, 2004, the Federal Election Commission notified the Pat Toomey for Senate Committee and you, in your official capacity as Treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to the Pat Toomey for Senate Committee at that time.

Upon further review of the allegations contained in the complaint, on April 19, 2005, the Commission found reason to believe that the Pat Toomey for Senate Committee and Jeffrey M. Zimaskind, in his official capacity as Treasurer, violated 2 U.S.C. §§ 441a(f), 441b(a), and 434, provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath. All responses to the enclosed Subpoena to Produce Documents and Order to Submit Written Answers must be submitted to the General Counsel's Office within 30 days of your receipt of this letter. Any additional materials or statements you wish to submit should accompany the response to the subpoena and order. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation. Please note that you have a legal obligation to preserve all documents, records and materials relating to the subject matter of the Factual and Legal Analysis until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

You may consult with an attorney and have an attorney assist you in the preparation of your responses to this subpoena and order. If you intend to be represented by counsel, please

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advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notification or other communications from the Commission.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Lela Scott, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas
Chairman

cc: Patrick J. Toomey

Enclosures

Factual and Legal Analysis
Designation of Counsel Form
Subpoena and Order

**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

Respondents: Pat Toomey for Senate Committee MUR: 5415
Jeffrey M. Zimkind, in his official capacity as Treasurer

I. INTRODUCTION

This matter was generated based upon a complaint received by the Federal Election Commission ("Commission") through the procedures outlined in 2 U.S.C. § 437(g)(a)(1). Citizens for Arlen Specter, Inc. alleged that Club for Growth ("CFG") and the Pat Toomey for Senate Committee ("Toomey Committee") violated the Federal Election Campaign Act of 1971, as amended by coordinating communications related to the Pennsylvania Republican Senate Primary in the 2004 election cycle.¹

II. FACTUAL SUMMARY

A. CFG Publicly Opposed Specter and Supported Toomey

CFG began publicly opposing Senator Arlen Specter and supporting Congressman Toomey one year before the Pennsylvania primary election. One published report notes that, then-President of CFG, Stephen Moore "told a reporter that he wanted to beat Specter because having 'a major scalp on the wall' would make the Club for Growth more intimidating to other Republicans."² Congressman Toomey announced his candidacy for a U.S. Senate seat representing Pennsylvania in February 2003. Shortly thereafter, CFG began making public

¹ The complaint does not provide the title or subject matter of the ads that were allegedly coordinated. Rather, the complaint indicates that the ads aired in certain Pennsylvania markets beginning in February 2004. According to the complaint, the Toomey Committee and CFG ran ads in the same media outlets, but the Toomey did not continue its stated media plan while CFG continued to run ads in those outlets that advocated the defeat of Senator Specter.

² Matt Bai, *Fight Club*, THE NEW YORK TIMES MAGAZINE, Aug. 10, 2003, p.26; see also Nicholas Thompson, *Attacks on Fiscal Moderates Fuel Battles Within GOP*, BOSTON GLOBE, May 19, 2003.

statements indicating its strong support for him.³ Eleven months before the primary election, the organization posted an endorsement of Congressman Toomey on its website.⁴ CFG's statements of public support continued through the months leading up to the election.

CFG's public statements indicated that the organization planned to spend significant amounts of money on ads related to the Pennsylvania Republican Senate Primary and, according to disclosure reports and press accounts, it did.⁵ A January 2004 article reported that CFG was "putting more money behind [Toomey] than any other race this year. The Club for Growth has already spent \$650,000 on pro-Toomey ads and plans to spend upwards of \$1.5 million before the April 27 primary." The report quotes Moore as having said, "We view this as the most important political race outside of the presidential race."⁶

Ads related to the Pennsylvania race may have been funded by different entities under the CFG umbrella, which include Club for Growth, Inc. PAC ("CFG PAC") and Club for Growth, Inc., a corporation registered under Section 527 of the I.R.S. Code ("CFG 527"). Some of the ads contain a disclaimer indicating that "Club For Growth, Inc. PAC" paid for the ad. Other ads contain a disclaimer stating simply that "Club for Growth" paid for the ad. Because some of the ads explicitly state that they were funded by CFG PAC, it is possible that the ads referring to

³ In May 2003, CFG's executive director David Keating reportedly stated that the organization was particularly focused on supporting Toomey against Specter. Nicholas Thompson, *Attacks on Fiscal Moderates Fuel Battles Within GOP*, BOSTON GLOBE, May 19, 2003, available at <http://www.newamerica.net/index.cfm?pg=article&pubID=1232>; see also Douglas Kiker, *Pa.'s Pivotal GOP Senate Primary*, CBSNEWS.COM, Apr. 17, 2004.

⁴ Memorandum from Stephen Moore, to Club for Growth Members (May 29, 2003), available at <http://www.clubforgrowth.org/members-only/030529.php>.

⁵ See *Call Goes Out to Aid Specter*, ROLL CALL, Apr. 22, 2004 (reporting that CFG spent \$1.4 million on advertisements attacking Specter) and Rebecca Flass, *Is Specter too liberal for Pennsylvania?*, ADWEEK, Mar. 15, 2004 ("The group originally said it budgeted more than \$150,000 for the campaign, but spending has gone 'way beyond that,' said executive director David Keating.").

⁶ Kelley Beaucar Vlahos, *Specter Defies Ranks and Expectations* (Jan. 6, 2004), Fox News, at <http://www.foxnews.com/story/0,2933,107430,00.html>; see also Lauren W. Whittington, *Call Goes Out to Aid Specter*, ROLL CALL, Apr. 22, 2004.

1 "Club for Growth" refer to CFG 527; however, an investigation would be needed to confirm this
 2 conclusion. The complaint does not specify whether CFG 527 or CFG PAC, or both, paid for the
 3 advertisements allegedly coordinated with the Toomey Committee. Further, L.R.S. disclosure
 4 reports filed by CFG 527 are inconclusive because they do not specify the candidate(s) or race(s)
 5 associated with all of CFG 527's disbursements.⁷

6 B. The Toomey Committee and CFG Used the Same Political Consultant

7 The Toomey Committee and CFG had significant and overlapping ties to Red Sea, LLC
 8 ("Red Sea"), a political consulting firm based in Washington, D.C., during the 2004 election
 9 cycle.⁸ One of Red Sea's principals, Jon Lerner, apparently was a political consultant to both the
 10 Toomey Committee and CFG contemporaneously during the 2004 election cycle. For example,
 11 Roll Call identified Lerner as "a Toomey campaign consultant" and reported that Lerner handled
 12 the Toomey Committee's advertising for the primary election.⁹ With regard to CFG, a letter
 13 from the organization's then-president to its members identified Lerner as the organization's
 14 "political consultant."¹⁰ Thus, in his consulting role, Lerner appears to have been in a position to

⁷ L.R.S. rules do not require identification of the candidate or race associated with the disbursements by 527 organizations and give 527 organizations the option of paying taxes associated with disbursements rather than disclosing them.

⁸ According to its mission statement, Red Sea designs and builds advocacy campaigns, including paid advertising. Red Sea, LLC, *Mission Statement*, www.redseallc.com/mission (visited July 14, 2004).

⁹ Lauren W. Whittington, *Call Goes Out to Aid Specter*, ROLL CALL, Apr. 22, 2004 and Stuart Rothenberg, *Toomey Won't Get a Free Ride from 'Pit Bull' Specter*, ROLL CALL, Mar. 6, 2003.

¹⁰ Letter from Steven Moore, President, Club for Growth, to Club for Growth members, June 28, 2004, available at <http://www.jeffersonreview.com/articles/2004/062804/club.htm>; see also Memo from Jon Lerner, Basswood Research, to Club for Growth Advocacy, November 20, 2003, available at <http://www.clubforgrowth.org/031120-medicarepoll-memo.php>; Memo from Basswood Research to Club for Growth, May 6, 2003, available at <http://www.clubforgrowth.org/news/ohio-memo.php>, Basswood Research at <http://www.redseallc.com/basswood> (describing Basswood Research as a "subsidiary of Red Sea, LLC"), and Gwen Florio, *Poll: Coors, Schaffer too close to call*, Rocky Mountain News, June 16, 2004 ("Pollster Jon Lerner of Basswood Research, who conducted the Club for Growth survey...").

1 know non-public information regarding the Toomey campaign and CPG's plans for the 2004
2 election cycle and to advise his clients on both matters.

3 The Toomey Committee's first disbursements to Red Sea were made in March 2003.
4 According to its disclosure reports, the Committee relied on Red Sea extensively for services
5 related to the Pennsylvania primary campaign including consulting services, database
6 management, media buys for television and radio, and the production of television and radio ads.
7 In total, disclosure reports indicate that the Toomey Committee disbursed in excess of \$1.5
8 million to Red Sea for these services.

9 By contrast, CPG has had a relationship with Red Sea since 2000 and made substantial
10 disbursements to the company during the 2004 election cycle. In 2001, Red Sea produced an ad
11 for CPG that addressed Specter's opposition to President Bush's proposed tax cuts.¹¹ During the
12 2004 election cycle, Red Sea provided consulting and media services to CPG in connection with
13 campaigns in several states. In its disclosure reports, CPG PAC reported disbursements totaling
14 approximately \$530,000 to Red Sea in connection with specific campaigns other than the
15 Toomey/Specter race and in connection with campaigns left unidentified in its disclosures.
16 Additionally, CPG 527 disclosed disbursements to Red Sea in excess of \$650,000 from June
17 2003 through June 2004 for ad production and consulting services for unidentified candidates
18 and races. Thus, CPG entities and Red Sea maintained a business relationship over a period of
19 more than three years up to and beyond the Pennsylvania primary election in April 2004.

20 Whether Red Sea provided specific services to CPG in connection with the Toomey
21 campaign or Pennsylvania primary election is an open question. In its disclosure reports, CPG

¹¹ Julie Samuels, *Club for Growth Continues Call For Tax Cut* (April 13, 2001), NATIONALJOURNAL.COM, at <http://nationaljournal.com/scripts/printpage.cgi?members/adspotlight/2001/04/0413cfg1.htm>. The ad is titled "Senate Friends Of The Tax Collector."

1 PAC did not describe the purpose of any of its disbursements to Red Sea as having been made in
 2 connection with the Pennsylvania primary, and CFG claimed in response to the complaint that
 3 Red Sea was not involved in the ads the complaint alleges were coordinated.¹² However, this
 4 does not completely resolve the issue. Although the PAC connected some campaigns with
 5 disbursements made to Red Sea in its disclosure reports,¹³ there are other reported disbursements
 6 totaling \$79,668 to Red Sea for media buys which do not reference any specific campaign.
 7 Notably, in March 2004, the Reports Analysis Division sought clarification from CFG PAC
 8 regarding the purposes of the media disbursements for unidentified candidates, but CFG
 9 responded without identifying the candidates to which the disbursements related.¹⁴ This does not
 10 appear consistent with CFG PAC's practice of specifying the candidate(s) or race(s) connected
 11 with its disbursements. Additionally, because the IRS reports do not identify the candidate(s) or

¹² In its response, CFG stated that Red Sea "had no role in the creation or distribution of the advertisement referenced in this complaint" and that the company "did not create, produce or distribute the advertisement." CFG Response, Keating Aff. ¶ 9.

¹³ CFG PAC reported the following disbursements to Red Sea for specific campaigns: \$20,000 on March 6, 2004, for the benefit of Ted Poe; \$30,000 on March 10, 2004, for the benefit of Jack Ryan; \$34,000 on March 19, 2004, for the benefit of Ariane Wohlgenuth; \$20,234 on March 30, 2004, for the benefit of Ariane Wohlgenuth; \$144,896 on April 30, 2004, for the benefit of Curt Brown; \$25,017.80 on May 8 for the benefit of Curt Brown; and \$155,005 on August 16, 2004 for the benefit of James DeMint.

¹⁴ The RFAI asked that CFG "clarify all expenditures made for 'tv production costs', and 'tv (air) placement buy'" associated with the disbursements. In response, CFG PAC filed an amended monthly report in which it indicated:

By way of clarification, the Club for Growth PAC reported these expenditures in accordance with 11 C.F.R. § 104.20(b) which states that 'Political committees that make communications that are described in 11 C.F.R. 104.4 and not under this section.' The communications to which these disbursements relate were not indep. expenditures and they were not made on behalf of a specifically identified candidate. Rather, they were akin to electioneering communications, despite the fact that political committees cannot make electioneering communications. Thus, as PAC expenditures they were required to be reported, and were reported, as operating expenditures.

Club for Growth, Inc. PAC Amended February Monthly Report of Receipts and Disbursements (April 16, 2004). CFG did not provide information regarding the content of the communications or identify the candidate, race, or issue to which the communications related.

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1 race(s) connected with CPG 527's disbursements to Red Sea, it cannot be determined at this time
 2 whether some of those payments were made in connection with the Pennsylvania race.¹⁵

3 III. LEGAL ANALYSIS

4 The information available raises questions as to whether CPG and the Toomey
 5 Committee coordinated communications through Red Sea in connection with the 2004
 6 Republican Primary Election in Pennsylvania. A payment for a coordinated communication
 7 made for the purpose of influencing a Federal election is an in-kind contribution to the candidate,
 8 authorized committee, or political committee with whom or which it is coordinated. See
 9 2 U.S.C. § 441a(a)(7)(B)(i), 11 C.F.R. § 109.21(b)(1). The Commission's regulations provide a
 10 three-prong test to determine whether a communication is coordinated. To satisfy the first prong
 11 of the test, someone other than a candidate, an authorized committee, or a political party
 12 committee must pay for the communication. See 11 C.F.R. § 109.21(a)(1). The second prong
 13 evaluates the content of the communication. See 11 C.F.R. § 109.21(c). The third and final
 14 prong of the test evaluates the conduct of the parties. See 11 C.F.R. § 109.21(d)(4). All three
 15 prongs of the test must be satisfied to support a conclusion that a coordinated communication
 16 occurred. See 11 C.F.R. § 109.21(a); *see also* Explanation and Justification for Regulations on
 17 Coordinated and Independent Expenditures, 68 Fed. Reg. 772 (Jan. 3, 2003).

18 In its response to the complaint, the Toomey Committee denies that it coordinated its
 19 communications with CPG through a common vendor. In an affidavit for the Toomey
 20 Committee, Mark Dion, Campaign Manager, attests that "there was absolutely no contact
 21 whatsoever between the Toomey campaign and the CPG concerning advertising." Toomey
 22 Committee Response, Mark Dion Aff. ¶ 6. He attributes the decision to suspend television ads in

¹⁵ The IRS does not require identification of the candidates or races related to the expenditures.

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1 February to a resource allocation determination. Dion does not state whether the Toomey
 2 Committee discussed CFG's plans with its consultant or consultants at Red Sea, but only that
 3 there was no direct contact between the campaign and CFG.

4 The Commission's decision to investigate whether coordination, in fact, occurred is based
 5 upon a constellation of factors covered by the Commission's coordination regulations, perhaps
 6 most importantly, the fact that the same consultant from Red Sea personally worked with both
 7 the Toomey Committee and CFG on campaign advertising contemporaneously during the 2004
 8 election cycle.

9 A. Source of Payment

10 The coordination test requires that someone other than the candidate or his authorized
 11 committee pay for the communications. See 11 C.F.R. § 109.21(a)(1). The complaint alleges
 12 that coordination resulted in the ads run by CFG PAC and/or CFG 527 between February and
 13 March 2004.

14 B. Content¹⁶

15 The content standard, the second prong of the test, is evaluated with respect to four
 16 criteria:

- 17 (1) A communication that is an "electioneering communication";¹⁷
- 18
- 19 (2) A public communication that republishes, disseminates or distributes candidate
- 20 campaign materials prepared by the candidate, the candidate's committee, or the
- 21 candidate's agent;

¹⁶ In *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *appeal filed*, No. 04-5352 (D.C. Cir. Sept. 28, 2004), the District Court invalidated the content standard of the coordinated communications regulation and remanded it to the Commission for further action consistent with the Court's opinion. In a subsequent ruling, the Court explained that the "deficient rules technically remain 'on the books,'" and did not enjoin enforcement of this (or any other) regulation pending promulgation of a new regulation. *Shays v. FEC*, 340 F. Supp. 2d 39, 41 (D.D.C. 2004).

¹⁷ "Electioneering communication" means any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office; is publicly distributed within 30 days before a primary election; and is targeted to the relevant electorate in the case of a candidate for Senate. See 11 C.F.R. § 100.29(a).

- (3) A public communication that expressly advocates the election or defeat of a clearly identified candidate for federal office; or
- (4) A public communication that refers to a clearly identified federal candidate or political party; is publicly distributed or disseminated 120 days or fewer before a primary or general election or convention or caucus with the authority to nominate a candidate; and is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction where one or more candidates of the political party appear on the ballot.

11 C.F.R. § 109.21(c). A communication that meets any of these four criteria meets the content requirement of the test for determining coordinated communications.

The content standard appears to be satisfied because CPG's advertisements qualify as "public communications" under 11 C.F.R. § 109.21(c)(4). CPG's ads depicted Specter's name and photograph, though the photographs were occasionally embellished with illustrations, graphics, and animation. See 11 C.F.R. § 110.29(b)(2). The ads referring to Specter also aired on television stations in Pennsylvania within less than 120 days before the primary. See 11 C.F.R. § 100.21(c)(4). Moreover, ads run by CPG 527, if it is a mere corporation, would also qualify as "electioneering communication" under 11 C.F.R. § 109.21(c)(i).

C. Conduct

The conduct standard, the third prong of the coordination test, requires analysis of affirmative acts taken by the parties who are alleged to have engaged in the activity. The conduct standard may be satisfied by affirmative acts that fall into six general categories, among them, use of a common vendor.¹⁸ See 11 C.F.R. § 109.21(d)(4). The Explanation and Justification makes clear that this category does not presume coordination from the mere

¹⁸ The other conduct standards are: request or suggestion; material involvement, substantial discussion; former employee or independent contractor; dissemination, distribution, or republication of campaign material; and agreement or formal collaboration. The Complaint does not contain specific allegations that the other conduct standards apply.

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presence of a common vendor. *See* 68 Fed. Reg. 783 (Jan. 3, 2003). The use of a common vendor in the creation, production or distribution of a communication satisfies the conduct standard only if certain criteria are met, namely:

- (1) The person paying for the communication contracts with, or employs, a "commercial vendor" to create, produce or distribute the communication.
- (2) The commercial vendor, including any officer, owner or employee of the vendor, has a previous or current relationship with the candidate or political party committee that puts the commercial vendor in a position to acquire information about the campaign plans, projects, activities or needs of the candidate or political party committee. This previous relationship is defined in terms of specific services related to campaigning and campaign communications and these services would have to have been rendered during the election cycle in which the communication is first publicly distributed.
- (3) The commercial vendor uses or conveys information about the campaign plans, projects, activities or needs of the candidate or political party committee, or information previously used by the commercial vendor in serving the candidate or political party committee, to the person paying for the communication, and that information is material to the creation, production or distribution of the communication.

See 11 C.F.R. § 109.21(d)(4). If the CFG ads meet each of the above criteria, then the ads satisfy the conduct standard through use of a common vendor. *See* 11 C.F.R. § 109.21(d)(1).

With regard to the first criterion, available information indicates that CFG used outside vendors to create, produce and distribute the advertisements associated with the Pennsylvania primary.

With regard to the second criterion, an investigation is needed to determine whether CFG consulted with Red Sea in connection with the Pennsylvania primary during the election cycle for the primary.¹⁹ If an investigation reveals that it had, then the second criterion would appear to be met since Red Sea had a concurrent relationship with the Toomey Committee that would have

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1 put Red Sea in a position to acquire and use material information about the Committee's plans,
 2 goals, strategies, and budget.²⁰ The Toomey Committee disbursed funds to Red Sea each month
 3 for approximately one year prior to the primary election, and CFG's response indicates that Red
 4 Sea also provided services to CFG during this period.

5 Relevant to the third criterion, given its role as a consultant to both CFG and the Toomey
 6 Committee, Red Sea was in a position to use or convey its knowledge about both clients as it
 7 guided their resource allocation prior to the election. Importantly, while providing consulting
 8 services, arranging media buys, and producing television ads for the Toomey Committee, Red
 9 Sea provided the same types of services to CFG. Despite the fact that a different vendor may
 10 have produced the ads that CFG presumes are at issue in this complaint, as CFG maintains, the
 11 Commission does not believe that this circumstance ends the coordination inquiry. The
 12 regulations require that the common vendor use or convey the information acquired from the
 13 candidate or committee. See 11 C.F.R. § 109.21(d)(4)(iii). Given its concurrent roles with CFG
 14 and the Toomey Committee, Red Sea could have used or conveyed material information to CFG
 15 who could have later used the information in the creation, production, or distribution of its
 16 advertising with a different vendor.

17 The Commission has obtained a letter from Lerner to David Keating, Executive Director
 18 of CFG, dated December 2003. In the letter, Lerner noted that "*henceforth* no person employed
 19 by or affiliated with Red Sea, LLC or its subsidiary companies will have any discussions or

¹⁹ As discussed *supra*, CFG PAC and CFG 527's disclosure reports to the FEC and I.R.S. respectively, contain entries for media buys that do not specify the candidate or race to which they relate. The candidate(s) advantaged by two large expenditures made by CFG PAC, for example, are not identified in its disclosure reports.

²⁰ As one published report stated, "Toomey will be relying on a new consulting team to direct his effort. . . . Jon Lerner of Red Sea will do the campaign's advertising. The Club for Growth has relied on and continues to use Red Sea for its polling and advertising . . ." Stuart Rothenberg, *Toomey Won't Get A Free Ride from 'Pit Bull' Specter*, ROLL CALL, Mar. 6, 2003.

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1 communications with any person employed by or affiliated with the Club for Growth pertaining
2 to the Republican U.S. Senate primary in Pennsylvania that is scheduled to take place on
3 April 27, 2004." Although both CFG and the Toomey Committee were clients of Red Sea for
4 approximately eight months before this letter was prepared, the affidavit does not indicate
5 whether any discussion occurred between CFG and Red Sea regarding the primary prior to this
6 December 2003 letter. Further, CFG's response to the complaint does not explain the
7 circumstances under which CFG became aware of the need or desire for the understanding
8 outlined in this letter.

9 Even if the Commission assumes that Lerner's December 2003 letter is entirely accurate
10 and Red Sea did not specifically discuss the Pennsylvania primary with CFG after that date, it
11 does not foreclose the possibility of coordination. The use of "henceforth" in the letter suggests
12 that the letter may have marked the beginning of a change in Red Sea's services. If Red Sea
13 provided consulting services to CFG in connection with the Pennsylvania primary before Lerner
14 sent his letter to CFG in December 2003, Red Sea may have used information about the Toomey
15 Committee's campaign plans, activities or needs in serving CFG. According to published
16 reports, Lerner personally worked with both the Toomey Committee and CFG on campaign
17 advertising during the 2004 election cycle, and therefore would have been in a position to use his
18 knowledge about each of his clients when advising them.

19 The foregoing is a sufficient basis to investigate whether CFG's advertisements were
20 coordinated with the Toomey Committee through a common vendor. If the advertisements were
21 coordinated, the costs associated with their production and distribution and paid for by a CFG
22 entity may constitute an in-kind contribution to the Toomey Committee in excess of the
23 contribution limitations set forth in 2 U.S.C. § 441a(a)(2)(A). CFG PAC's disclosures indicate

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1 that media and consulting services provided in connection with the Pennsylvania primary far
2 exceed \$5,000. Moreover, CFG PAC would have been required to report the costs of the
3 communications as a contribution to the Toomey Committee in accordance with 2 U.S.C. § 434
4 and 11 C.F.R. § 109.21(b)(3).

5 If an investigation reveals that CFG 527 coordinated with the Toomey Committee in the
6 production of these communications, the specific violation would depend on the status of CFG
7 527 as determined by the Commission. Based on the three alternatives, the Commission may
8 determine that CFG 527 is a political committee, the nonfederal account of CFG PAC, or merely
9 a corporation. If CFG's 527 is a separate political committee, coordination would have resulted
10 in excessive contributions to the Toomey Committee in violation of 2 U.S.C. § 441a(a). If
11 CFG's 527 organization serves as the nonfederal account of CFG's PAC, coordination would
12 have resulted in both prohibited and excessive contributions from the PAC in violation of
13 2 U.S.C. §§ 441a and 441b. If CFG's 527 organization is a mere corporation, coordination
14 would have resulted in prohibited corporate contributions in violation of 2 U.S.C. § 441b(a).

15 Under the Commission's regulations, when coordination results from the use of a
16 common vendor, the authorized committee with whom the communication is coordinated is not
17 subject to liability for accepting or receiving the in-kind contribution or for failing to report the
18 communication as an in-kind contribution unless the candidate or authorized committee engaged
19 in conduct that would satisfy conduct standards (d)(1), (d)(2), or (d)(3). See 11 C.F.R.
20 § 109.21(b)(2).

21 Available information provides a sufficient basis to investigate whether the Toomey
22 Committee engaged in activity that would satisfy 11 C.F.R. § 109.21(d)(1)-(d)(3). Most
23 importantly, the Toomey Committee took the affirmative step of hiring Red Sea after CFG had

1 hired the vendor and likely with the knowledge that CFG intended to campaign on behalf of
2 Toomey. Indeed, based upon press reports, it appears to have been well known that CFG had a
3 relationship with Red Sea and that CFG intended to launch an aggressive campaign on Toomey's
4 behalf. The affirmative step taken by the Toomey Committee to engage the common vendor,
5 under these circumstances, provides a factual predicate for investigating whether the Toomey
6 Committee participated in the alleged coordination.

7 **D. Conclusion**

8 Accordingly, the Commission finds reason to believe that the Pat Toomey for Senate
9 Committee and Jeffrey M. Zimkind, in his official capacity as treasurer, violated 2 U.S.C.
10 §§ 434 and 441a(f) by knowingly accepting and failing to report excessive contributions, in the
11 form of coordinated expenditures, from Club for Growth, Inc., PAC. Further, based upon the
12 unclear status of CFG 527, the Commission finds reason to believe that the Pat Toomey for
13 Senate Committee and Jeffrey M. Zimkind, in his official capacity as treasurer, violated
14 2 U.S.C. §§ 441a(f), 441b(a) and 434 by knowingly accepting and failing to report excessive
15 and/or prohibited contributions, in the form of coordinated expenditures, from Club for Growth,
16 Inc. and Club for Growth Inc., PAC.

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